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IN THE

Supreme Court of the United States

October Term, 1939.

No. 734 18

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID
W. COMPTON, et al.,

Petitioners,

v.

THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES,

Respondent.

**Brief of the Respondent in Opposition to
Petition for Writ of Certiorari.**

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THE PENNSYLVANIA COMPANY FOR INSURANCES
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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETI-
TION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT.

In the interest of brevity we will not attempt to make our own summary of the facts. We point out to the Court, however, the following:

1. The complaint alleged (Record p. 15)—“The Independence Trust Shares purchased by the Trustee are held in a common portfolio but the account of each Purchaser is credited with the shares or fraction of shares to which he is entitled. *At any time the Purchaser may demand and receive the Independence Trust Shares which are credited to his account, or the liquidating value thereof in cash.*”

2. The complaint does not charge that The Pennsylvania Company was guilty of any misconduct, negligence or mismanagement and there was no testimony to that effect (See opinion of Kalodner, J., Record p. 439; and his state-

ment at the hearing upon the application for an injunction, Record p. 395).

3. The aggregate of all the payments made by the nine original complainants was \$3320.00 against which two of them had withdrawn a total of \$468.71. This made the aggregate of the net claims of the nine original complainants \$2851.29, exclusive of interest and cost and exclusive of credit for the value of the Independence Trust Shares held by The Pennsylvania Company, Trustee, for their respective accounts. The largest amount paid by any one of the original complainants was \$810.

4. The averments of fraud were denied in the answer of Independence Shares Corporation and the individual respondents.

5. None of the complainants testified at any of the hearings.

ARGUMENT.

1. The Circuit Court of Appeals Correctly Decided That the Complaint Alleges No Federal Cause of Action Against The Pennsylvania Company.

The Circuit Court of Appeals correctly found that jurisdiction could not be founded upon diversity of citizenship because with one exception all of the complainants were citizens of Pennsylvania and all of the respondents were citizens of Pennsylvania. *Lee v. Lehigh Valley Coal Company*, 276 U. S. 542; *Salem Trust Co. v. Manufacturers Finance Company*, 264 U. S. 182. It also correctly found that the claims of the complainants could not be aggregated and that since the claim of no one of them amounted to more than \$2,000, the amount in controversy did not exceed the sum of \$3,000 exclusive of interest and costs. *Pinel v. Pinel*,

240 U. S. 594; *Lion Bonding & Surety Co. v. Karatz*, 262 U. S. 77.

The Circuit Court of Appeals found that the District Court had jurisdiction of the controversy by virtue of the provisions of Sections 12 (2) and 22 (a) of the Securities Act of 1933 (15 U. S. C. A. 77 l. (2) and 77 v. (a)), and that since the Securities Act stems from the exercise of federal power under the commerce clause, jurisdiction did not depend upon diversity of citizenship or the amount in controversy.

The Circuit Court of Appeals went on to find that Section 12 (2) of the Securities Act provides a right to sue in a District Court of the United States for one who has purchased securities upon an untrue statement of a material fact made by the use of any means of transportation or communication in interstate commerce, and that the nature of the suit provided for is one on the part of the defrauded person to seek a money judgment or a money decree to recover "the consideration" paid to him. It correctly concluded that since The Pennsylvania Company was not charged with any violation of the Securities Act it was not a proper part to the suit, and stated in its opinion as follows:

"Since the recovery of the appellees is limited as we have indicated, it follows that The Pennsylvania Company is not a proper party to the suit. The appellees have stated no cause of action against it and indeed have alleged no breach of duty upon its part cognizable under the Securities Act or otherwise. The injunction against The Pennsylvania Company therefore may not be maintained."

II. The Circuit Court of Appeals Correctly Held That None of the Prayers of the Complaint Asking for Specific Relief Could Be Granted.

The prayers of the complaint asked for a receiver of Independence Shares Corporation and its liquidation and that this same receiver take possession of the trust assets in the hands of The Pennsylvania Company and terminate the trusts by making distribution to the beneficiaries. The Circuit Court of Appeals correctly held that *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491, was in point. In that case this Court held that a receivership is merely an ancillary and incidental relief and not an end in itself, and that a receiver will not be appointed by a federal court at the instance of a simple contract creditor. In our case, the complainants are merely potential contract creditors.

The Circuit Court of Appeals did not cite *Gordon v. Washington*, 295 U. S. 30 which is also exactly in point. In that case this Court again held that a receivership was not an end in itself, and further held that it was improper for a federal district court to appoint a receiver for a trust in the hands of a competent trustee (See also *Home Mortgage Co. v. Ramsey* 49 F. (2d) 738).

While in *Gordon v. Washington*, *supra*, it was charged that the Pennsylvania Banking Department, which had become successor trustee to certain mortgage pools formerly administered by a closed state bank, was remiss in the administration of its trust, in our case the District Court found that there was no charge nor any testimony that The Pennsylvania Company had been guilty of any misconduct, negligence or mismanagement.

The complainants contend that Section 15 and Section 22 (a) of the Securities Act grant to the District Courts of

the United States the broad and sweeping equitable power to appoint a receiver not only of the seller of securities but also of the trusts set up by the certificates sold. The Circuit Court correctly held that no such additional powers were granted by the Act and that *Pusey & Jones v. Hanssen supra*, was still the law. It might have added that the Act grants injunctive remedies to the Commission under Sections 8 (b), 8 (d), 8 (e) and 20, and that this evidences the intention of Congress to grant no new injunctive remedies to purchasers.

III. The Circuit Court of Appeals Adequately Preserved the Rights of All the Complainants Against Such of the Respondents as Were Charged with Violations Under the Securities Act.

The Circuit Court has not dismissed the complaint as against any of the respondents excepting The Pennsylvania Company. It held that the District Court should retain jurisdiction of the proceedings as a class suit, and that proper amendments may be made limiting the prayer of the complaint to a demand for a money judgment. It has further protected the complainants by holding that the filing of the original complaint tolled the statute of limitations imposed by Section 13 of the Act.

The complainants, therefore, have been fully protected in the event that they are able to sustain their allegations of fraud at trial. In this connection it will be noted that none of the complainants have as yet testified.

IV. Since Each Subscriber May Terminate His Interest in the Trusts at Will, the Aid of a Court in Equity Is Not Required to Terminate for Fraud.

As we have pointed out above, the complaint alleges that The Pennsylvania Company credits each subscriber with the shares or fraction of shares to which he is entitled and that each subscriber may at any time demand and receive the Independence Trust Shares which have been credited to his account or the liquidating value thereof in cash. The right of each subscriber to terminate his interest in the trust is, therefore, an absolute one exercisable by him at will. Fraud or no fraud, this right can be exercised at any time. Since each of the complainants can terminate the trust as to himself at any time, there is no legal justification for an entire termination of the trusts at the instance of a handful of subscribers against the desires of the many subscribers who have permitted their trust assets to remain in the hands of The Pennsylvania Company.

V. A Receivership for the Trusts Would Subject the Trust Assets to Unjustifiable Receiver's Fees and Counsel Fees.

The principal effect of appointing a receiver for the trust assets would be to subject them to unjustifiable receiver's fees and counsel fees. The charges of The Pennsylvania Company are fixed by the contract certificates. It makes a deduction of 25¢ per \$10.00 payment, and until the subscriber had made all of his payments it makes no other charge. The net result is that if any subscriber discontinues his payments The Pennsylvania Company administers his trust assets without charge. If a receiver were to be appointed, he would be entitled to commission upon the

value of the trust assets passing through his hands and commissions upon collected income. He would require the advice of counsel, and in view of the value of the trust assets, the counsel fees claimed would be large.

The principal beneficiaries of a receivership would be the receiver and his counsel.

VI. The Circuit Court of Appeals Had Jurisdiction to Hear the Appeal.

The order of the Lower Court entered on June 2, 1939, restraining The Pennsylvania Company from paying over and Independence from receiving the fund of \$38,258.85, was appealable under the Act of March 3, 1891, as amended (28 U. S. C. A. Section 227) which reads as follows:

“Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals;”

There was no question about the appealability of the order under the language of the Act or under the cases interpreting it. The order was interlocutory and enjoins The Pennsylvania Company from paying and Independence from receiving a large sum of money. It was granted after a hearing (Record pp. 388-416) duly set by the Court upon motions for injunctions which were broad enough to cover the subject matter of the restraining order.

The cases have drawn a distinction between temporary restraining orders granted pending a hearing and interlocutory restraining orders granted after a hearing. The first type are not appealable, and the second are appealable. *Smith v. Vulcan Iron Works*, 165 U. S. 518; *In re Tampa Suburban Railroad Company*, 168 U. S. 583; *Highland Avenue and Belt Railroad Company v. Columbian Equipment Company*, 168 U. S. 627; *Houghton v. Meyer*, 208 U. S. 149; *Pack v. Carter*, 223 Fed. 638; *Schainmann v. Brainard*, 8 F. (2d) 11; *Northern Pacific Railway Company v. Pacific Coast Lumber Manufacturers' Association*, 165 Fed. 1.

It is of no moment that the order appealed from is intended to preserve the status quo. *Enelow v. New York Life Insurance Company*, 293 U. S. 379; *Shanferoke Coal & Supply Corporation v. Westchester Service Corporation*, 293 U. S. 449; *Hickey v. Johnson*, 9 F. (2d) 498; *Morgan v. Kroger Grocery & Baking Company*, 96 F. (2d) 470; *Metropolitan Life Insurance Company v. Banion*, 86 F. (2d) 886; *Field v. Kansas City Refining Company*, 296 Fed. 800.

The Court is especially referred to two of its recent cases cited above, in which the statute was construed liberally in favor of the appellate jurisdiction of the Circuit Court of Appeals. In the *Enelow* case it was held that the reference of a law case to the equity side of the court was equivalent to an interlocutory order granting an injunction, and in the *Shanferoke* case it was held that the denial of a stay of proceedings in an action on a contract, until arbitration had been held pursuant to the terms thereof, was the denial of an injunction.

The petition for certiorari should be denied.

Respectfully submitted,

WALTER BIDDLE SAUL,
Attorney for Respondent.

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